



October 8, 2002

Ms. Ashley D. Fourt
Assistant District Attorney
Tarrant County
401 West Belknap
Fort Worth, Texas 76196-0201

OR2002-5702

Dear Ms. Fourt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170273.

The Tarrant County Sheriff's Department (the "department") received a request for copies of a specified department officer's personnel and training records. You claim that the requested information is excepted from disclosure pursuant to sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Section 552.103 provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The department maintains the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold from disclosure. In order to meet this burden, the department must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both elements of this test in order for the information at issue to be excepted from disclosure under section 552.103. *See id.*

You state that the requested information pertains to a criminal case pending before County Criminal Court Number 9, Tarrant County, Texas. You also state that your office is prosecuting the defendant in that case for the offense of driving while intoxicated. Finally, you inform us that the peace officer who is the subject of this request was the officer who arrested the defendant and that the release of the information at issue would interfere with the prosecution of the state's case, since this officer "has not yet testified and is not subject to cross-examination." Although we find that the department has established that criminal litigation was pending when it received this request for information, we also find, however, that the department has failed to sufficiently demonstrate how the submitted information is related to the pending criminal prosecution. We also are unable to determine how the information is related to the pending prosecution based on our own review of the submitted information. *See* Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation). Therefore, after carefully reviewing your representations and the information at issue, we conclude that the department may not withhold any portion of the submitted information from disclosure under section 552.103 of the Government Code.

The department also claims that the submitted information is excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). We note that a governmental body that raises section 552.108 must reasonably explain, if the requested information does not supply an explanation on its face, how and why section 552.108 is applicable to the information. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). Based on our review of your representations as noted above and our review of the information at issue, we find that the department has also failed to sufficiently demonstrate how the release of the information at issue would interfere with the detection,

investigation, or prosecution of crime. *See* Gov't Code § 552.108(a)(1); *see also Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); Open Records Decision No. 434 at 3 (unless records show on their face that disclosure would interfere with law enforcement or prosecution, law enforcement agency must explain how release of particular records or parts thereof will do so). Accordingly, we also conclude that the department may not withhold any portion of the information at issue from disclosure under section 552.108 of the Government Code.

We note, however, that portions of the information at issue are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.¹ Section 1701.306 provides in relevant part:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

Occ. Code § 1701.306. We have marked the declarations contained within the information at issue that must be withheld from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

We also note that the information at issue contains information that is excepted from disclosure pursuant to section 552.101 in conjunction with section 1703.306 of the Occupations Code. Under section 1703.306, information acquired from a polygraph

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information protected from disclosure by other statutes.

examination may not be disclosed, unless it falls into one of that section's narrow exceptions. Section 1703.306 provides in part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code, § 1703.306. Based on our review of the information at issue, it does not appear that any of the exceptions in section 1703.306 apply in this instance. Accordingly, we conclude that the department must withhold from disclosure the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

We also note that the information at issue contains fingerprint information that is excepted from disclosure pursuant to section 552.101 in conjunction with section 559.003 of the Government Code. Sections 559.001, 559.002, and 559.003 provide:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 559.001, .002, .003. Section 559.002 does not appear to permit the disclosure of the fingerprint information at issue to the requestor. Therefore, we conclude that the department must withhold from disclosure the fingerprint information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 559.003 of the Government Code.

We also note that the information at issue contains some information that is excepted from disclosure pursuant to section 552.101 in conjunction with chapter 411 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. *See* Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *See id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Accordingly, we conclude that the department must withhold from disclosure the information that we have marked pursuant to

section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. *See id.*; *see also* Gov't Code § 411.106(b), .082(2) (defining criminal history record information).

We also note that portions of the information at issue are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. Section 552.101 also encompasses information that is protected from disclosure pursuant to the common-law right to privacy. Information is protected by the common-law right of privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert denied*, 430 U.S. 931 (1977); *see also* Open Records Decision No. 611 at 1 (1992). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. *See* Open Records Decision Nos. 600 (1992) (finding personal financial choices concerning insurance and designation of beneficiary of employee's retirement benefits generally confidential), 545 (1990) (common law privacy protects personal financial information), 523 (1989) (information related to individual's mortgage payments, assets, bills, and credit history excepted under the common law right to privacy). Based on our review of the information at issue, we conclude that the department must withhold from disclosure the financial information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

We also note that portions of the information at issue are excepted from disclosure pursuant to section 552.117(2) of the Government Code. Section 552.117(2) excepts from disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members, regardless of whether the peace officer made an election under section 552.024 of the Government Code. *See* Gov't Code § 552.117(2). Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, we conclude that the department must withhold from disclosure all information contained within the information at issue pertaining to any current peace officer's home address, home telephone number, social security number, and information indicating whether the officer has family members pursuant to section 552.117(2) of the Government Code. We have marked a representative sample of this type of information that must be withheld from disclosure by the department.

We also note that some of the information at issue may be excepted from disclosure pursuant to section 552.117(1) of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the official or employee did not

request confidentiality in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, we conclude that the department must withhold from disclosure all information that is contained within the information at issue pertaining to any other current or former official's or employee's home address, home telephone number, social security number, and information indicating whether the officer or employee has family members pursuant to section 552.117(1) of the Government Code, if these officials or employees made a request for confidentiality under section 552.024 for this information prior to the date on which the present request was received by the department.

We note that social security numbers contained within the information at issue that are not protected from disclosure under section 552.117(1) may still be confidential under federal law. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). The department has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Therefore, we have no basis for concluding that any of these social security numbers are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the department, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the department should ensure that each number was not obtained and is not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

Finally, we note that portions of the information at issue are subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, we conclude that the department must withhold from disclosure the information that we have marked pursuant to section 552.130 of the Government Code, if such information concerns a motor vehicle operator's or driver's license or permit issued by an agency of this state.

In summary, the department must withhold from disclosure the declarations that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code. The department must withhold from disclosure the information that we have marked pursuant to section 552.101 in conjunction with section 1703.306 of the Occupations Code. The department must withhold from disclosure the fingerprint information that we have marked pursuant to section 552.101 in conjunction

with section 559.003 of the Government Code. The department must withhold from disclosure the information that we have marked pursuant to section 552.101 in conjunction with chapter 411 of the Government Code. The department must withhold from disclosure the financial information that we have marked pursuant to section 552.101 in conjunction with the common-law right to privacy. The department must withhold from disclosure all information contained within the information at issue pertaining to any current peace officer's home address, home telephone number, social security number, and information indicating whether the officer has family members pursuant to section 552.117(2) of the Government Code. The department must withhold from disclosure all information that is contained within the information at issue pertaining to any other current or former official's or employee's home address, home telephone number, social security number, and information indicating whether the officer or employee has family members pursuant to section 552.117(1) of the Government Code, if these officials or employees made a request for confidentiality under section 552.024 for this information prior to the date on which the present request was received by the department. Social security numbers contained within the information at issue that are not protected from disclosure under section 552.117(1) may still be confidential under federal law. The department must withhold from disclosure the information that we have marked pursuant to section 552.130 of the Government Code, if such information concerns a motor vehicle operator's or driver's license or permit issued by an agency of this state. The department must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental

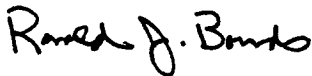
body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 170273

Enc. Marked documents

cc: Ms. Mimi Coffey
Law Firm of Mimi Coffey
2601 Airport Freeway, Suite 500
Fort Worth, Texas 76111
(w/o enclosures)